NZLR

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

AP No. 83/96

UNDER the Accident Rehabilitation and Compensation Insurance Act 1992

BETWEEN CHRISTOPHER DAVID SMITH of Napier

Appellant

A N D ACCIDENT REHABILITATION AND COMPENSATION INSURANCE CORPORATION

Respondent

Hearing: 24 April 1997

Counsel: J G Krebs for Appellant
P J Zumbach for Respondent

Judgment: 24 April 1997

ORAL JUDGMENT OF GREIG J

Solicitors:
Langley Twigg, NAPIER, for Appellant
Office Solicitor, Accident and Rehabilitation & Compensation Insurance Corpn, WELLINGTON, for Respondent

This is an appeal against the decision of 27 November 1995 dismissing the appeal against the Corporation's decision quantifying the amount of the appellant's independence allowance calculated under the Act in respect of his disability. The appeal proceeds by leave granted in the District Court on 26 April 1996.

The appellant suffered serious injury in a motor vehicle accident in 1978. He was awarded compensation under the Accident Compensation Act 1972 including an entitlement under s 119 of that Act. That was a provision for lump sum payments in respect of permanent loss or impairment of bodily function. The appellant was re-assessed on two separate occasions and by 1991 he had been assessed to a total impairment of 55 percent receiving a lump sum of $3,850. That was equivalent to 55 percent of the gross maximum amount that was available under s 119. The appellant also received the sum of $10,000 which was the maximum payable as a lump sum under s 120 of the 1972 Act.

With the repeal of the previous legislation and the enactment of the Accident Rehabilitation and Compensation Insurance Act 1992 these provisions for payments of lump sums and for assessment of permanent loss or impairment of bodily function disappeared. There is now this provision for the payment of an independence allowance under s 54 of the 1992 Act. The amount of that allowance is $40 per week for persons who have a degree of disability of 100 percent. Those who have less degree of disability are paid at lesser rates on a graduated scale set out under the Independence Allowance Assessment Regulations 1993, SR 1993/195. That scale and the graduation of the rates is not on a straight line so that those who have a 50 percent disability do not receive half of the allowance ($20) but receive $11. The policy considerations behind that, as is accepted by counsel for the appellant, is that those who have a greater disability have a greater need for a higher rate. The costs of disability are greater where the disability itself is greater, so that the graduation is on a curving scale with what appears to be a steepish rise between the 90's, between 90 and 99 percent where the weekly rate, as allowed under the Regulations, is $31 whereas at 100 percent it is $40.

As would be expected and as is accepted by the appellant, those who have received lump sums under the previous Act have to give credit for that and have those taken into account in calculating the independence allowance for them. Section 54 (14) makes a provision for that where a person is to be assessed for an independence allowance. Likewise, under the transition provisions of Part VIII of the 1992 Act, s 148 provides specifically for those persons who received lump sums under former Acts. That section provides at its beginning that a person shall not be entitled to an independence allowance where they have received any payment under ss 119 or 120 of the 1972 Act except as provided under subss (2) and (3) of s 148. Subsection (2) provided a procedure by which before 1 April 1993 a person who had received a lump sum payment could repay it and then claim an independence allowance. In the appellant's case that would have required, it seems, repayments of both the lump sum payments received under ss 119 and 120. The time of course has elapsed since that occurred and it may well have been an academic option for an appellant in circumstances such as this one, and no doubt any like him, to contemplate the repayment of sums received some considerable time before.

Subsection (3) of s 148 provides as follows:

> " 148. (3) Notwithstanding subsection (1) of this section, any person who suffered personal injury by accident within the meaning of the Accident Compensation Act 1972 or the Accident Compensation Act 1982 before the 1st day of July 1992, and who has since the 1st day of July 1992 suffered an increased degree of permanent loss or impairment of bodily function resulting from that personal injury by accident, may apply for an independence allowance under and subject to the conditions of section 54 of this Act, but any such independence allowance shall be calculated by deducting from any degree of disability assessed under that section any percentage permanent loss or impairment of bodily function in respect of that personal injury by accident in respect of which a payment has been made under section 119 of the Accident Compensation Act 1972 or section 78 of the Accident Compensation Act 1982. "

The point before the learned District Court Judge and this Court is the application of the words as to the calculation of the deduction from the degree of disability, the percentage impairment, loss of bodily function in respect of which payment has been made under s 119 and thereafter the application of Reg 11 and the use as directed under Reg 11 (1) (b) of the table set out in Part II of the Second Schedule which is the table which sets out the graduated scale and rates for payment.

There is no real argument or dispute as to the application of and what is to be done under the statute under subs (3). In this case the appellant was re-assessed after the coming into force of the 1992 Act at 100 percent disability. It is accepted that the disability assessed previously was 55 percent, that that should be deducted from the 100 percent thus leaving 45 percent as the amount on which the entitlement is to be calculated. The respondent calculates that by taking the 45 percent, applying it to the scale under the Second Schedule to the Regulations, and then reading across the scale produces a figure of $9 a week which is subject to a slight increase for inflation. The appellant's contention is that the direction to use the table requires, in justice and fairness, that the amount should be calculated having regard to the 100 percent, the $40, so that he should receive $29. That is done on the basis that at a 55 percent previous impairment and percentage the weekly rate would be $11, that the additional 45 percent should then be granted so that there is a notional equivalent of $40 a week as the independence allowance.

The appellant's contentions require an assumption that there can be a simple comparison between the basis on which awards were made under s 119 and under which awards can be made under ss 54 and 148 of the current legislation. Assuming that to be the case, then it is perhaps surprising to find that if one assumes that the amount received by the appellant under s 119 is equivalent or is to be taken to be equivalent to 55 percent and $11 a week as an independence allowance that he is then receiving only a further $9 as a 45 percent disability. The result is that on that notional basis he receives $20 a week notionally, that is to say half the independence allowance, when he is totally disabled. Another way of calculating it, as suggested by the appellant, is that he is receiving no more than he would be entitled to receive were he only 80 percent disabled. I think it must be noted that this graduated scale in the

Second Schedule moves in tens so that between 80 and 89 percent is the range at which the $31 is calculated.

It certainly does seem surprising and perhaps appears as an anomaly that in a case such as this the amount that is payable to the appellant is of such a low amount whereas he has received only 55 percent of the maximum amount that was available to him before. Presumably if the original legislation had remained in force he would have been granted on his re-assessment a total maximum amount but here it seems that he is never going to receive more than half the amount on a notional basis, at least, that would otherwise have been available.

There are, as I have already indicated, earlier assessments to be taken into account and I think it cannot be ignored that the payment under s 120 of the 1972 Act was also made to this appellant. That is a benefit that is no longer available and is now to be included, presumably, in the new provisions for these independence allowances.

It is not, as I understand it, a situation where it can be said that there is a patent absurdity or something that is manifestly wrong in the way in which the legislation has been drafted and enacted. The legislation, the Act and the Regulations are plain. To achieve what the appellant seeks requires some amendment, some alteration, some insertion and a reading of the legislation which I think the plain words cannot bear. The intention I think is plain, that the subtraction is to take effect, that the figure that then is produced in this case, 45 percent, is to be applied directly to the table and that the weekly rate is then produced accordingly. There is no room, in my judgment, for the use of the table as sought by the appellant though that might appear to him and to others indeed to be a better and, in his view, fairer way of dealing with the matter.

In the result I am satisfied that the learned District Court Judge was correct in his view and his decision. The appeal cannot succeed and must be and is therefore dismissed.